SUPREME COURT OF APPEALS OF VIRGINIA.

RICHARDS v. COMMONWEALTH.

Jan. 16, 1908.

[59 S. E. 1104.]

1. Jury—Selection of Panel.—Const. art. 1, § 8 [Va. Code 1904, p. ccix], guarantees an accused the right of trial by jury of the county where he is to be tried. Code 1887, § 4024 [Va. Code 1904, p. 2121], provides that in any criminal case, if qualified jurors, not exempt from serving, cannot be conveniently found in the county in which the trial is to be, the court may cause so many of such jurors as may be necessary to be summoned from any other county. Held, that merely because there had been two previous protracted trials in which the juries had failed to agree, and because in selecting the jury for the first trial 27 persons had to be summoned in order to get a panel of 16 qualified jurors, and in obtaining a jury for the second trial 48 persons were summoned, only 41 of whom had to be examined in order to get a panel of 16 jurors, did not authorize the court to summon a foreign jury.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 31, Jury, § 12.]

2. Criminal Law—Evidence—Opening Evidence.—On a prosecution for murder there was evidence that prior to the killing accused had had a bottle containing oiled shot, that a bottle containing such shot was found near the scene of the shooting, and that between the point from which it was claimed the shot was fired and the point where deceased was when struck, there were powder-burnt leaves. Held, that testimony of a witness that he had examined the leaves and found on them a black oily substance which would not mix with water, and that he was of the opinion that it was oil, was not objectionable, though it involved an opinion of the witness.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1048-1050.]

3. Same.—Where a person has a special opportunity for observation, he may testify as to his opinions as conclusions of fact, though he is not an expert, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury as it appeared to the witness at the time, and the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1053.]

4. Same—Facts Forming Basis of Opinion.—The facts and circumstances on which such a witness bases his opinion or conclusion

should be stated as far as is practicable, that the jury may have a basis to test its value.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1057.]

5. Same—Nature of Objects.—It was proper to permit witnesses to testify that the mustache worn by a certain man, whom the evidence tended to prove was accused, was in their opinion a false mustache.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 1048-1050.]

6. Same—Identity.—Where, on a prosecution for murder, there was evidence that deceased was shot with oiled shot, and that a bottle containing such shot was found near the scene of the crime, it was proper to permit witnesses to give their opinion as to the identity of the bottle found with the bottle they stated they had seen in the possession of accused prior to the killing.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 1043.]

7. Same—Evidence—Res Gestæ.—On a prosecution for the murder of one who was shot while riding in a buggy, testimony of a witness that deceased stated to him after the shooting that a person other than accused had ridden with deceased at his invitation, and then left deceased before he reached the point where he was shot, was not admissible as res gestæ, though the statement was made a couple of hours after the shooting and the witness was the physician who had been called to attend deceased.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, §§ 811, 819, 820.]

8. Homicide—Dying Declarations.—The statements of deceased were not admissible as a dying declaration, as they did not relate to the cause of death, nor to any circumstance of the transaction which resulted in death, and did not tend to identify accused as the guilty party.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 26, Homicide, §§ 448-450.]

9. Witnesses—Cross-Examination.—A witness for the commonwealth testified to the measurement of certain tracks, and on the next trial he was again put on the stand by the commonwealth, but asked no questions as to the tracks. Defendant on cross-examination sought to have the witness testify as to the tracks, but an objection that such procedure would make the witness defendant's own was sustained. Afterwards, while defendant was introducing his evidence, on his motion, the witness was placed on the stand by the court as its witness, and defendant's counsel permitted to cross-examine him as to the tracks. Held, that the action of the court resulted in no prejudice to defendant.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 949, 950.]

10. Criminal Law—Evidence—Results of Experiments.—Where, on the issue of the identity of the criminal, there is evidence as to foot-prints, a witness should not be permitted to testify that he had made tracks with different shoes, and found that in every instance the tracks were shorter than the shoes, unless it appears that they were made under the same or substantially similar conditions existing at the time of the experiment as at the time of the making of the tracks in question.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 854.]

11. Witnesses—Impeachment—Contradictory Statements on Former Trial.—Where a witness testifies differently than at a former trial as to any matter material and relevant to the issues, proof of such contradictory statements is admissible.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 50, Witnesses, §§ 1252-1256.]

12. Same.—The judge's notes taken at a former trial of a case are not admissible in evidence for the purpose of contradicting a witness.

13. Criminal Law—Trial—Instructions.—There is no error in the refusal of requested instructions fully covered by those given.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 14, Criminal Law, § 2011.]

Error from Circuit Court, Floyd County.

John W. Richards was convicted of murder, and he brings error. Reversed, and remanded for a new trial.

Scott & Buchanan, V. M. Sowder, and *B. H. Custer,* for plaintiff in error.

The Attorney General, for the Commonwealth.

BUCHANAN, J. The first error assigned by the prisoner is to the action of the circuit court in ordering the venire for his trial to be summoned from a county other than that in which the offense was alleged to have been committed and the accused was tried.

The bill of exceptions taken to this action of the court shows that the order was made upon the motion of the commonwealth, over the prisoner's objection, without any evidence except "the record" in the cause.

The authority for summoning a jury from another county or corporation is found in section 4024 of the Code of 1887 [Va. Code 1904, p. 2121], and is as follows: "In any criminal case in any court, if qualified jurors not exempt from serving cannot be conveniently found in the county or corporation in which the trial is to be, the court may cause so many of such jurors as may be necessary to be summoned from any other county or corporation by the sheriff or sergeant thereof, or by its own officer."

The contention of the accused is that under the Constitution and laws of the commonwealth he had the right to be tried by a jury of the county where the crime he was charged with was alleged to have been committed, where he was indicted and tried, and in which he himself and the principal witnesses for and against him resided; that he could not be tried by a jury from another county or corporation unless qualified jurors could not be conveniently found in his own county; and that "the record" upon which the court based its opinion that qualified jurors could not be conveniently found in his county wholly fails to show that fact.

As before stated, the commonwealth, to sustain its motion to have a jury summoned from another county, introduced no evidence, and relied solely, as did the court in sustaining the motion, upon what appeared "from the record in the cause." "The record" shows that the accused was indicted for murder at the October term, 1905, of the court, his trial commenced on the 17th, and on the 30th of the month the jury were discharged because they were unable to agree upon a verdict, and the cause continued.

In selecting the panel of 16 persons from which the jury at that trial was taken, 8 were found free from exception among the 16 persons summoned for the trial of another person accused of a felony and the other causes to be tried at that term of the court. The court then directed 12 other persons to be summoned from a list furnished by it. Of those 11 were summoned, 8 of whom were sworn, examined, and found free from exception, and the panel completed.

By consent the cause was continued at the next February term of the court. At that term the court ordered that the names of 36 persons be drawn from the jury box. Of these the sheriff was directed to summon 32 for the next (April) term of the court. Thirty-one of these were summoned, and of them 6 were found free from exceptions. To complete the panel 17 persons were summoned from a list of 22 furnished by the court. Of these 10 appeared, all of whom were found free from exception, and the panel of 16 secured. At that trial, which continued from the 17th to the 28th day of April, the jury, being unable to agree, was discharged, and the cause continued. At the next (July) term of the court the order complained of, directing a jury to be summoned from Patrick county for the October term of the court, was entered. These are all the facts which "the record" disclosed as to the necessity of summoning a jury from another county.

The question of the propriety of summoning a foreign jury, under the provisions of section 4024 of the Code of 1887 [Va. Code 1904, p. 2121], although in substance enacted more than

50 years ago, has seldom been raised in this court. The rule, however, which should govern us in passing upon the question, is well scttled, and is stated by Judge Moncure in Chahoon's Case, 21 Grat. 822, 833, as follows: "In the exercise of the power conferred by this law, the court of trial must, of necessity, have a great deal of discretion, and the appellate court, in revising the judgment, ought not to reverse it for error in this respect, unless it be plain that such discretion has been improperly used." See, also, Page's Case, 27 Grat. 954.

Upon the former trials there was comparatively little difficulty in finding qualified jurors. Upon the first trial one-half of those summoned, whose names had been drawn from the jury box for the trial of another person charged with a felony, were found free from exception. The remaining 8 required to complete the panel of 16 were obtained from 11 persons summoned from the list furnished by the court. Upon the second trial only about one-fifth of the 31 summoned, whose names were drawn from the jury box, were found to be qualified jurors; but the remaining 10 required to complete the panel of 16 were obtained from the 17 persons summoned from the list of names furnished by the court. It would seem from the order of the court that these 10 jurors were all that appeared or that were examined from the 17 summoned. The order states that "10 of the persons summoned from said *venire facias* from the said list furnished by the court appearing in court, to wit," and after giving their names the order continues, "who were sworn and examined by the court, found free from all legal exception, and qualified to serve as jurors." In none of the cases which have come to this court, in which this question was involved, was a jury summoned from another county upon so little evidence of the necessity or propriety of such action.

In Wormeley's Case, 10 Grat. 658, there were affidavits that at a former trial between 300 and 400 persons had been summoned for the trial of the accused, and another who was jointly indicted with him, in order to get a panel for his trial, and that at the term at which the order was made to summon a jury from the cities of Richmond and Petersburg only 1 qualified juror was obtained from a venire of 24. In addition, it appeared from the testimony of both the commonwealth and the accused, who was asking for a change of venue, that it would be very difficult, if not impossible, to get qualified jurors in the county where the court was sitting.

In Chahoon's Case, *supra,* there had been a mistrial at the March term of the court. At the June term of the court all of the venire summoned to try the prisoner were present except one, but, none of them being found to be qualified jurors, the prisoner moved the court to have other persons summoned as jurors from

the city (Richmond); but the court overruled his motion, being satisfied, as the order states, "by evidence adduced and heard that qualified jurors could not be conveniently found in the city," and ordered jurors to be summoned from two other cities. In that case the sergeant of the city and one of his deputies testified, giving the reasons upon which they based their judgment that it would be inconvenient, and they believed impossible, to get a jury from the city.

In Sands' Case, reported in 21 Grat. 871, the accused had been found guilty and the judgment reversed by this court (20 Grat. 800), and after it had been remanded there had been a mistrial. On that (second) trial, after there had been an abortive effort to get a jury from the city of Richmond, where the case was tried, a jury was summoned from another city. On the third trial 18 of the 19 persons who had been summoned under the writ of *venire facias* appeared, and, none of them being qualified jurors, because of opinions formed and expressed as to the case, the court ordered a jury to be summoned from other cities. In considering the propriety of making such order, the court, by consent, read the testimony heard upon this point at the second trial, part of which was that of the sergeant of the city of Richmond and his deputy that it would be very inconvenient, if not impossible, to get a jury in the city of Richmond.

The facts upon which the court based its judgment in those cases, respectively, in ordering juries from other jurisdictions, are not mentioned for the purpose of indicating that we think it was necessary to show as much as appeared in those cases, or that the facts upon which the court based its action should be established in the same manner, but to show that, in order for the trial court to exercise the discretion vested in it under section 4024 of the Code, it should appear in some manner that such a course is reasonably necessary in order to obtain qualified jurors. The facts upon which the court based its order in this case do not show that it would have been inconvenient, within any reasonable meaning of that word, to have obtained qualified jurors from Floyd county, whose population was more than 15,000, for the trial of the accused.

Manifestly it was not intended by the provisions of section 4024 of the Code that an accused person should be deprived of the right of "a trial by a jury of his vicinage" (that is, of the county or corporation where he is to be tried) secured to him by the Constitution (section 8, art. 1 [Va. Code 1904, p. ccix]) and the laws of the state (Code 1887, §§ 4018, 4019, and 4024 [Va. Code 1904, pp. 2114, 2115, and 2121]), merely because there had been two previous protracted trials in which the juries had failed to agree, and because in selecting the jury for the first trial 27 persons had to be summoned in order to get a panel of

16 qualified jurors, and in obtaining a jury for the second trial 48 persons were summoned, only 41 of whom, it seems, had to be examined in order to get a panel of 16 jurors free from exceptions. If these facts alone are sufficient to authorize a trial court to summon a foreign jury, the right intended to be secured by the Constitution and laws of the state would be of little value to the accused, and there would be comparatively few cases in which there was much public interest, or about which there was much excitement, where the court would not find it necessary to summon, or at least feel justified in summoning, a jury from another county or corporation.

We are of opinion, therefore, that the facts disclosed by "the record," upon which alone the court based its action, were plainly insufficient to justify the order complained of, and for that error its judgment must be reversed.

The next error assigned is to the action of the court in admitting improper evidence and in refusing to properly instruct the jury in reference thereto.

No witness testified that he was present when the deceased was shot. The evidence relied on to establish the commonwealth's charge is entirely circumstantial. Among other things, the commonwealth sought to prove that some 18 months prior to the killing the accused had in his possession and was using as a part of his hunting outfit a bottle containing oiled or greased shot; that the same bottle containing oiled or greased shot, was found the morning after the killing near the scene of the shooting; and that between "the blind," the point from which it is claimed the shot was fired, and the point where the deceased was when struck, there were powder-burnt leaves, and on the leaves some black, oily, or greasy substance with which water would not mix. Tice, one of the witnesses whose testimony was objected to, stated, among other things, that he "examined the leaves on the bushes between the fence corner and the buggy, in a line with the buggy and the pine bush from which a limb that was shot was hanging, and in a line with the shot; that he found on the leaves a black, oily, greasy something, that indicated or looked like oil or some other kind of grease, that glazed the leaves, and the water on them was in beads or puddles and would not mix; that at the time he examined the leaves and at this time he was of opinion that it was oil or grease." At this point the accused objected, and moved the court to exclude the witness' opinion as evidence; but the court permitted the witness to proceed, who then added that "he could not tell whether it was oil, butter, or some other kind of grease, but at the time he believed it was oil or some other kind of grease, and to the best of his knowledge and belief it was

oil or some other kind of grease. He did not know if a man's belief was as strong as his knowledge."

The objection made to this evidence is that it was merely the witness' opinion and belief.

It is well settled that the opinions of witnesses are generally inadmissible; that they must testify to facts only, and not as to opinions or conclusions based upon facts. But there are exceptions to the rule as well settled as the rule itself. Va., etc., Chem. Co. *v.* Knight, 106 Va. 674, 676, 56 S. E. 725, and authorities cited; Tyler *v.* Sites, 90 Va. 539, 542, 19 S. E. 174; 1 Elliott on Ev. § 672.

Where a person has a special opportunity for observation, he may testify to his opinions as conclusions of fact, although he is not an expert, if the subject-matter to which the testimony relates cannot be reproduced or described to the jury as it appeared to the witness at the time, and the facts upon which the witness is called upon to express his opinion are such as men in general are capable of comprehending and understanding; but the facts and circumstances upon which he bases his opinion or conclusion should be stated as far as is practicable, in order that the jury or other tribunal may have some basis upon which to test the value of his opinion. See Jordan *v.* Com., 25 Grat. 943, 945, 946; 1 Elliott on Ev. §§ 675, 676, 678; 17 Cyc. pp. 81-87. In the textbooks cited, numerous instances are given where the opinion of witnesses may be received. Among them are identity and the appearance of things animate and inanimate.

In the last-named work it is said, in discussing this question (page 86): "A witness may, after enumerating such as he can of the constituent facts, state the effect on his mind of the numerous phenomena which constitute the impression of appearance, whether of animate or inanimate objects; it being affirmatively shown that the witness had adequate opportunity for observation, that the constituent facts cannot be fully placed before the jury, and that the ultimate fact is relative to the issue."

Tested by this rule, which seems to us the correct one, the evidence of Tice was admissible.

Upon the same grounds the evidence of Conner and Poff, that the mustache worn by the man who had been seen by them, and who the evidence tended to prove was the accused, appeared to them, or was in their opinion, a false mustache, was admissible.

And for like reasons the evidence of Noah Wilson and Lee Poff as to the identity of the bottle found near the place of shooting with the bottle they stated they had seen in the possession of the accused some 18 months prior to the killing was also admissible.

The instructions, J and K, offered by the accused and rejected by the court, mentioned in the same assignment of error, asked

the court to tell the jury to disregard the evidence of these witnesses as to the shot bottle, because they did not attempt to identify it, but only expressed their opinion or belief as to its identity. These instructions were based upon the same erroneous view as was the objection to the evidence when offered, and for the same reason that the court overruled the objection to the evidence it properly refused to give the instructions.

Dr. Thomas, a witness for the commonwealth, who was called to visit the deceased professionally after he was shot, testified that he reached him about two hours afterwards; that the deceased "was in a state of shock. He realized he was seriously hurt. I think he was conscious of impending death. I think he knew what he was talking about." The witness was then asked: "Did he state anything to you about a man getting in the buggy and riding with him? If so, what did he state?" To which witness replied: "He spoke of that. I asked him about the man getting in the buggy with him near Copper Hill, and he said a man got in the buggy with him near Copper Hill. I asked him if the man asked to ride with him, or 'did you ask the man to ride?' and he said, 'I asked the man to ride.' I asked him who it was, and he said the man lived over about Ferrum, and tried to call his name, and seemed to be unable to call it. He was so weak he could not. He said the man got out of the buggy before and beyond where he was shot. That was before Dr. Huff came. He did not say whether the man had a gun or not."

This question and answer were objected to, but the court overruled the objection. This action of the court is assigned as error.

The evidence was not admissible, either upon the ground that it was part of the res gestæ or as a dying declaration. It is not claimed that the man who got in the buggy with deceased was the accused. On the contrary, that man had been called by the commonwealth as a witness and stated substantially the same as to his getting in and out of the buggy.

In order for a statement to be a part of the res gestæ, it must, as was said in Haynes' Case, 28 Grat. 942, 946, be "so connected with the very transaction or fact under investigation as to constitute a part of it." Joyce's Case, 78 Va. 287, 290; Barley *v.* Byrd, 95 Va. 316, 322, 28 S. E. 329; 1 Elliott on Ev. § 154.

The fact that some one, other than the accused, at the request of the deceased, rode with him in his buggy, and then left him before reaching the point where he was shot, is in no way connected with the transaction or fact under investigation—certainly not so connected with it as to constitute a part of it.

The statements of the deceased were not admissible as dying declarations, because they did not relate to the cause of the death, nor to any circumstance of the transaction which resulted in death. They do not tend to identify the accused as the guilty

party, nor do they establish the circumstances of the res gestæ, or show any transaction from which death resulted. Swisher *v.* Com., 26 Grat. 964, 21 Am. Dec. 330; O'Boyle's Case, 100 Va. 785, 795, 40 S. E. 121.

"Declarations," says Elliott on Ev. § 336, "of distinct or separate, prior or subsequent, occurrences, * * * are not competent evidence. These and other such declarations are not competent because they relate to distinct and separate transactions." See also, sections 332, 333; 21 Cyc. 973-975.

Assignments of error based upon bills of exceptions numbered 5, 12, and 16 may be considered together.

On the first trial the commonwealth put on the stand a witness named Conner, who testified, among other things, to the measurement of certain tracks leading from the "blind" from which the deceased was shot. On the last trial this witness was again put upon the stand by the commonwealth; but it asked no questions as to the said tracks or the measurements made by him. The defendant, upon his cross-examination, sought to have the witness testify as to the tracks and his measurements. This was objected to by the commonwealth, upon the ground that in asking about these matters he was making the witness his own. This objection was sustained by the court; but in sustaining the objection the court stated that the defendant could recall the witness when the commonwealth was through with its evidence and examine him as to the tracks. Afterwards, whilst the defendant was introducing his evidence, upon his motion the witness was placed upon the stand by the court as its witness, and the prisoner's counsel was permitted to cross-examine him as to the tracks and measurements. The action of the court in refusing to permit the accused to cross-examine the witness as the witness of the commonwealth is assigned as error.

In the course pursued by the court no prejudice resulted to the accused.

To rebut the evidence of this witness as to the tracks, which was regarded as favorable to the accused, because it tended to show that the tracks measured by the witness were shorter than the shoes which the accused wore or could wear, the commonwealth introduced a witness named Jack, who testified that during the second trial of the accused he had gone to the scene of the shooting and made tracks with his own and the shoes of another, and found that the tracks were shorter in every instance than the shoes.

The objection made to this evidence is that it did not appear that the experiments made by the witness were made under the same conditions as those which existed on the day of the murder.

It is not clear from the evidence that the conditions were the same, or substantially similar, and unless they were it seems to be

well settled that such experiments are not admissible. 1 Elliott on Ev. § 1249; Richmond P. & P. Co. *v.* Racks, 101 Va. 487, 44 S. E. 709; Wise Ter. Co. *v.* McCormick, 104 Va. 400, 51 S. E. 731. As the case will have to be reversed upon other grounds, it is unnecessary to pass upon this question; but it is proper to say that if, upon another trial, evidence of such experiments be offered, it should not be admitted, unless it satisfactorily appears that they were made under the same or substantially similar conditions to those surrounding the shooting of the deceased.

The refusal of the court to permit its notes taken at a former trial of the case to be used for the purpose of contradicting a witness introduced by the commonwealth is assigned as error.

If the witness had testified differently at the former trial as to any matter which was material and relevant to the issues presented by the trial, proof of such contradictory statement was clearly admissible. But it is generally agreed in this country that the judge's notes are not admissible evidence for that purpose, because the notes, however full they might be, were not taken in the discharge of any official duty, but for the judge's own private convenience. See 3 Wigmore on Ev. § 1666, and cases cited in note 1.

The action of the court in refusing to give instructions marked A, B, C, D, E, F. G, H, I, J, and K, asked for by the accused and in giving instruction No. 3, asked for by the commonwealth, is assigned as error.

The court gave five instructions offered by the commonwealth, ten offered by the accused, and three in lieu of instructions offered by the accused, making in all eighteen instructions. Without discussing in detail any of the instructions given or rejected, it is sufficient to say that in our opinion the court did not err in refusing to give the instructions rejected by it, as the instructions given fully and fairly submitted the case to the jury, and when that has been done there is no necessity or propriety in giving other instructions asked for by either party, even if they be correct statements of law as applied to the case, as they cannot subserve any good purpose, and may by their very number and the different manner in which the same proposition is stated confuse the jury. McCue's Case, 103 Va. 870, 49 S. E. 623; Southern Ry. Co. *v.* Stockdon, 106 Va. 693, 56 S. E. 713.

The errors assigned to the action of the court, based upon bills of exception numbered 13, 15, 17, and 18, need not be specially considered, as the rulings of the court upon the questions raised in each seem to us to have been clearly right.

The refusal of the court to set aside the verdict, because contrary to the law and the evidence, and grant the accused a new trial, is assigned as error. As the verdict will have to be set aside and a new trial granted for errors hereinbefore indicated,

it will be unnecessary and might be improper to consider this assignment of error, as the evidence may not be the same upon the next trial.

We are of opinion, therefore, to reverse the judgment of the circuit court, set aside the verdict, and remand the cause for a new trial.

Reversed.

Note.

The rule is well settled that whenever an impartial jury cannot be obtained in the county where the offense is charged to have been committed, and the court is satisfied, or it is made to appear, that such is the prejudice against the accused that an impartial jury cannot be obtained for the trial of the case in such county; the court must cause a jury to be summoned outside of said county. The only difficulty arising on the point being as to what state of facts will justify the application of the rule.

In a case arising in Kentucky under a statute similar to ours it was held that, on a trial for homicide, the fact that defendant had extensive relations, and had received three former trials, was sufficient to justify an order to the sheriff to summon jurors from an adjoining county. Brafford *v.* Commonwealth, 13 Ky. L. Rep. 154, 16 S. W. 710.

Error cannot be predicated, in a criminal cause, on the court's refusal to grant defendant's motion to have the jury summoned from an adjoining county on the ground that the prosecutors were people of influence and were using money to secure a conviction, as by Crim. Code of Kentucky, § 194, the court must satisfy itself, by making a fair effort, that it will be impracticable to obtain a jury free of bias in the county where the cause is pending before authorizing the summons of a jury from another county. Roberts *v.* Commonwealth, 15 Ky. L. Rep. 341, 94 Ky. 499, 22 S. W. 845.

When acting in such case the court must have large discretion; and the question as to whether the jury should be summoned from abroad, is for the trial court to determine. Chahoon *v.* Com., 21 Gratt. 822; Page *v.* Com., 27 Gratt. 954. And the appellant court will presume that the trial court acted rightly in the matter, unless the contrary plainly appears. Page *v.* Com., 27 Gratt. 954.

And it will be conclusively presumed, in the absence of a showing in the record to the contrary, that the court followed the law in selecting the jury. Moseley *v.* Commonwealth (Ky.), 84 S. W. 748.

Under the Kentucky Cr. Code, § 194, providing that, if the judge is satisfied that an impartial jury cannot be obtained in the county where the prosecution is pending, he may summon jurors from an adjoining county in which he shall believe there is the greatest probability of obtaining an impartial jury, the fact that other jurors had been summoned from a certain county did not establish the fact that an impartial jury could not have been gotten from that county, or that the judge did not believe that there was the greatest probability of obtaining an impartial jury from that county. Massie *v.* Commonwealth (Ky.), 36 S. W. 550.

The court may properly refuse to summon a jury from another county because of local prejudice, until efforts to obtain an impartial jury have failed. Puryear *v.* Commonwealth, 83 Va. 51, 1 S. E. 512.

But as to the necessity for exhaustive efforts in securing a local jury,

before the court before which a prisoner is arraigned for trial, if qualified jurors not exempt from serving cannot be **conveniently** found in the county or corporation, may send to another county or corporation for such jurors. See Sands *v.* Commonwealth, 21 Gratt. 871; Chahoon *v.* Commonwealth, 21 Gratt. 822; Craft *v.* Com., 24 Gratt. 602; Lawrence *v.* Com., 81 Va. 484; Page *v.* Com., 27 Gratt. 954.

KNIGHTS OF COLUMBUS *v.* BURROUGHS' BENEFICIARY.

Jan. 16, 1908.

[60 S. E. 40.]

1. Writ of Error—Instructions—Bill of Exceptions—Review.—Instructions not embraced in the bill of exceptions cannot be considered on writ of error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 2930.]

2. Insurance—Mutual Benefit Insurance—Nonpayment of Dues—Forfeiture.—A beneficial association, organized to carry on a system of fraternal insurance, has an inherent right to expel members for nonpayment of dues, and may also provide in its laws that such nonpayment, within a stipulated time after notice, shall, without further notice to the delinquent member, ipso facto work a forfeiture.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1895, 1917, 1918.]

3. Same—Charter and By-Laws.—A member in a beneficial association who holds a certificate stipulating that he shall be bound by the charter and by-laws of the association is conclusively presumed to know the charter and by-laws.

4. Same—Nonpayment of Dues—Effect.—Where the laws of a fraternal insurance order provide that nonpayment of an assessment, continuing for a specified time, shall operate ipso facto to terminate the connection between the order and the delinquent member, and to forfeit his rights as such, nonpayment of an assessment, continuing for the specified time, forfeits the right of the delinquent member without action on the part of the order; but where the laws of the order require that something shall be done by it to make the expulsion of a member complete, to terminate his rights, a strict compliance with the procedure prescribed is essential.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 28, Insurance, §§ 1917, 1918.]

5. Same.—Where the by-laws of a fraternal insurance order provide that any member of the order "shall ipso facto forfeit his membership * * * who fails * * * to pay his * * * assessment for 30 days from the date of mailing * * * the notice for assessment,"